IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-868

LINDBERG HUMMEL,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Lindberg Hummel, by counsel, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Virginia entered in this proceeding on August 31, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia as yet unpublished is attached as Appendix A. The order of the Supreme Court of Virginia dated August 31, 1978, is attached hereto as Appendix B. A petition addressed to the Supreme Court of Virginia praying for a stay of the execution of the judgment is attached hereto as Appendix C. Counsel for petitioner have been advised that action on this petition will be forthcoming and the record will be supplemented accordingly. The order of the Supreme Court of Virginia dated February 1, 1978, granting the appeal and supresedeas is attached as Appendix D. The order pronouncing judgment on the verdict of the Circuit Court of Rockingham County, Virginia, is attached as Appendix E.

JURISDICTION

The petitioner seeks this court's review of the judgment of the Supreme Court of Virginia entered on August 31, 1978, and this petition for a writ of certiorari was filed within ninety (90) days. The jurisdiction of this court is invoked under 28 U.S.C.A. §1257.

QUESTIONS PRESENTED

(1) Whether, in view of *Massiah v. United States,* 377 U. S. 201 (1964) and *Brewer v. Williams,* 430 U.S. 387 (1977), the trial court erred in refusing to suppress certain taped conversations which took place between the petitioner

and the key prosecution witness, said conversations having been recorded with the knowledge and direction of the Commonwealth of Virginia and occurring while petitioner was represented by counsel, in violation of his rights guaranteed by the Sixth Amendment to the Constitution of the United States of America, and made applicable to the States by the Fourteenth Amendment to the Constitution of the United States of America.

(2) Whether the actions of the Commonwealth denied the petitioner of his Sixth Amendment right to effective assistance of counsel.

CONSTITUTIONAL PROVISION INVOLVED

(1) *Constitution of the United States, Amendment VI:*

"In all criminal prosecutions, the accused shall enjoy the right to . . . . . have the assistance of counsel for his defense."

(2) *Constitution of the United States, Amendment XIV, §1:*

". . . . . nor shall any state deprive any person of life, liberty or property, without due process of law. . . . .".

STATEMENT OF THE CASE

Petitioner was convicted on June 24, 1975, in the Rockingham County Circuit Court of grand larceny by receiving stolen property and was sentenced to serve a term of ten (10) years in the penitentiary. He was released on bond pending his appeal to the Supreme Court of Virginia. On November 14, 1976, petitioner's brother, Woodrow Hummel, and the prosecution's key witness, Anthony Thomas

Terry (Terry), a convicted felon, met at a Harrisonburg, Virginia, restaurant and had a conversation. Following the conversation, Terry contacted Lt. Hubert Myers, a Harrisonburg Police Department detective. Detective Myers made arrangements for a telephone call to be made by Terry to petitioner from the Harrisonburg Police Department, and arrangements for Lt. Myers to tape record the conversations which were to be had with the petitioner. The attorney for the Commonwealth, David I. Walsh, was consulted prior to the first telephone call to the petitioner, and all calls were made with his knowledge and direction. The attorney for the Commonwealth justified his action on the ground that the Commonwealth was investigating a separate crime than the one for which the petitioner was indicted, that of bribery. Conversations between the petitioner and Terry took place on November 4, 1976, January 27, 1977, January 28, 1977, and February 2, 1977. All conversations were made from the Harrisonburg Police Department. At all times during which any conversations of Lindberg Hummel and Terry were being recorded, Hummel was represented by counsel, Holmes C. Harrison and Henry C. Clark, of the firm, Clark, Bradshaw, Smith & Harrison, Harrisonburg, Virginia. Hummel's counsel was unaware of the conversations, and Hummel was unaware that the conversations were being recorded.

The Supreme Court of Virginia reversed petitioner's conviction of June 24, 1975, and granted him a new trial. *Hummel v. Commonwealth*, 217 Va. 548 (1977). This decision was announced on January 14, 1977. Upon learning of the reversal and new trial, petitioner's counsel contacted him to inquire of Terry's whereabouts. Counsel urged petitioner to have Terry contact them, if he could be

located, for the purpose of interviewing him in preparation for the new trial. Petitioner, pursuant to advice of counsel, sought to locate Terry, and on January 27, 1977, Terry telephoned petitioner from the Harrisonburg Police Department. This conversation was recorded and transcribed and played before the jury. Petitioner acknowledged to Terry that he was trying to locate him, since he had been granted a new trial, and his attorneys wanted to talk to him. Petitioner further stated "I will give you something for going in and talk to him". He offered to pay Terry fifty dollars to see his attorney. Terry accepted the fifty dollar offer and later made arrangements by telephone with petitioner's attorney to go to his office for the interview.

Terry met with the petitioner's counsel at his office in Harrisonburg, Virginia, on January 28, 1977. Acting under the advice and direction of the Commonwealth's Attorney for Harrisonburg-Rockingham County, police detectives made arrangements with the Virginia State Police to conceal a wireless transmitter in Terry's clothing, and the entire conversation between Terry and petitioner's counsel, Holmes C. Harrison, was recorded by a tape recording machine in a police cruiser several blocks away. The conversation was transcribed, but was not introduced at trial.

At pretrial hearings on motions to suppress all of these conversations, both the tape recordings and the transcriptions, the Commonwealth of Virginia denied that this conversation was recorded because of any hint of impropriety on the part of counsel. The attorney for the Commonwealth was called as a witness and testified that the recording was made as part of an investigation of "another crime having been committed".

Re-trial of petitioner's case was scheduled for March 18, 1977. On March 15, 1977, the attorney for the Commonwealth informed petitioner's counsel of all of the taped conversations and of his intention to introduce them as part of his case in chief. On March 16, 1977, attorneys Harrison and Clark filed a motion with the court for leave to withdraw as counsel, citing as their grounds that a jury might draw an inference of improper conduct on their part, and that it would be prejudicial to the petitioner for them to represent him while they were attempting to justify their actions. They gave as further grounds that they might be called as witnesses. The court granted the motion, Hummel's counsel withdrew, and present counsel entered the case on March 18, 1977.

On April 8, 1977, and on April 25, 1977, hearings were held on counsel's motion to suppress all evidence obtained by means of or by virtue of intercepted oral communications between Anthony Thomas Terry and petitioner, Terry and petitioner's brother, Woodrow Hummel, and Terry and Holmes C. Harrison, petitioner's counsel. Petitioner relied upon *Massiah v. United States,* 377 U.S. 201 (1964), and *Brewer v. Williams,* 430, U.S. 387 (1977).

The trial court, in its oral opinion of April 8, 1977, stated:

> "....and the court has not given full consideration to the possible Sixth Amendment implication (sic) the *Massiah* indications of this situation. . . .".

The motion was denied without prejudice to the petitioner's right to renew the motion before the trial judge. The motion was renewed on April 25, 1977, and after argument of counsel, the court stated:

> "Well, I'll tell you, I don't mind saying this. I am aware of the fact that there is some merit in your contention and some of these cases go pretty far in protecting so-called Constitutional rights of an offender. I joined with the *Times Dispatch* and the shock I received when I read the concurring opinion of Mr. Justice Powell, but nevertheless, you have to bear in mind that both of these cases, *Brewer v. Williams,* as well as the *Massiah* case .... were both divided opinions. . . .".

The court went on to say:

> "The *Brewer, Williams* case was strongly divided. Now, I want to be frank with you. I have long been a believer that any evidence that is significant, bears any materiality should be admissible, I don't care how you get it. I don't care how it's acquired..... I think the day will come, and we're (sic) all be happier when any material, significant evidence of probative value regardless of how it is acquired ought to be admissible, and the party who is hurt by it, he can minimize it or nullify it by giving his testimony. . . .".

At the re-trial of the petitioner's case on April 27, 1977, the Commonwealth introduced the taped recordings of January 27, 1977, over petitioner's objection, again citing federal grounds. Hummel was convicted and sentenced to serve a term of five (5) years in the penitentiary. The obvious emphasis given by the jury to the taped conversations was apparent in that the jury after deliberating for two hours came back into the courtroom and requested to hear the tape again. Federal grounds were again raised in the hearing to set aside the verdict, citing *Massiah v. United States,* 377 U.S. 201 (1964), and *Brewer v. Williams,* 430 U.S. 387 (1977). The court overruled this objection and pronounced sentence on the verdict.

Petitioner appealed his conviction to the Supreme Court of Virginia, and on February 1, 1978, his petition for appeal and supersedeas was granted. He again relied upon the principles enunciated in *Massiah v. United States, supra.,*

and *Brewer v. Williams,* supra., as well as other federal and state authority. On August 31, 1978, the Supreme Court of Virginia affirmed the petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE VIRGINIA SUPREME COURT IS NOT IN ACCORD WITH THE PRINCIPLE ENUNCIATED BY THIS COURT IN *MASSIAH V. UNITED STATES,* AND *BREWER V. WILLIAMS.*

Among the reasons cited by the petitioner throughout these proceedings was that the recorded conversations were made at a time when petitioner was represented by counsel and that they should not have been admitted at trial since they were procured in violation of the doctrines enunciated in *Massiah v. United States,* supra, and *Brewer v. Williams,* supra.

In *Massiah,* supra, this court held that Massiah's Sixth Amendment right to counsel was violated, stating:

> ". . . . we hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel. It is true that in the *Spano* case the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his knowledge while he was free on bail. But, as Judge Haynes pointed out in his dissent in the court of appeals, 'if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon. . . . because he did not even know that he was under interrogation by a government agent' ". Supra at 206.

The Attorney General of Virginia contended that the statements were admissible since the Harrisonburg Police Department was investigating an entirely new and different crime, bribery, rather than that with which the defendant already stood accused. It is also argued that it acted legally in following up Terry's complaint of attempted bribery by an investigation aimed at ferreting out new and further criminal activity. Thus argued the Attorney General, while acting pursuant to its obligations to bring bribery to light, any information legally obtained would be admissible in Hummel's trial for receiving stolen property.

The Supreme Court of Virginia accepted the argument of the Attorney General and further held that the evidence was legally obtained during the investigatory stage of a crime, other than that for which the petitioner had been indicted, and that such evidence

> ". . . . . legally obtained in such an investigation will not be suppressed merely because the defendant, at the time of such investigation, already stood accused of another separate crime." *Hummel v. Commonwealth,* Record No. 771298.

In *Massiah* the Solicitor General of the United States "strenuously contended that the federal law enforcement agents had the right, if not indeed the duty, to continue their investigation of the petitioner and his alleged criminal associates even though the petitioner had been indicted". In response to that argument this court stated:

> "We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the

> suspected criminal activity of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial." (Supra at 207).

The obvious meaning of this passage is that while new evidence may be admissible at a subsequent trial for a separate offense, it may not be used in the trial of the case for which the accused was indicted and had counsel when the evidence was obtained.

The exclusionary rule of *Massiah* was recently reaffirmed in *Brewer v. Williams,* supra. Mr. Justice Stewart writing for the majority stated:

> "This right, guaranteed by the Sixth and Fourteenth Amendments, is indispensible to the fair administration of our adversary system of criminal justice. . . .". (Supra at 436).

He further stated:

> ". . . . .rather, the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. It thus requires no wooden or technical application of the *Massiah* doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments."

In this case as in *Massiah,* the petitioner was allegedly being investigated for a crime, bribery, other than that for which he was indicted, when he was interrogated; Terry acted as an agent of the Commonwealth of Virginia, just as Massiah's co-defendant, Colson, acted; the conversations

were surreptitiously recorded while the petitioner was represented by counsel; there was no waiver by the petitioner of his rights to have counsel present during the interrogations; and, as in *Massiah,* the state gave as its justification for invading petitioner's rights, its obligations to investigate new and further criminal activity.

II.

THE CONSTITUTIONAL QUESTION HEREIN IS OF EXCEPTIONAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE.

The interests of the individual and society are involved in the same or to a greater degree than in *Massiah v. United States,* 377 U.S. 201 (1964), and *Brewer v. Williams,* 430 U.S. 387 (1977).

> "The constitutional right of a defendant to the aid of counsel after indictment is basic to our adversary system of justice. . . . any secret interrogation of the defendant from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness and the conduct of criminal causes and the fundamental rights of persons charged with crime." *People v. Waterman,* 9 N.Y. 2d 561, 565, 175 N.E. 2d 445, 448.

This court has historically protected the sanctity of the attorney-client relationship, recognizing its significance to our adversary system of justice. The fundamental fairness of that system is guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. The act of the state in invading petitioner's

relationship with his counsel by surreptitiously recording a conversation between the attorney and a trial witness is an unconscionable abuse of the system. This court has an overiding interest to protect the individual and the public from such abuses.

This court has also recognized the importance of the independent preparation of a case by counsel. In this case, petitioner's counsel was denied that opportunity by the state, by inserting its presence during the interview of a crucial witness. To subvert the preparation of petitioner's case, as the state did here, is to deny him his Sixth Amendment right to the effective assistance of counsel.

Petitioner's Sixth Amendment rights were also violated by the state in that it denied him of his choice of counsel. The attorneys of his choice were forced to withdraw because of the invasion by the state of their office, thus rendering them ineffective. To permit this to occur is to give the state control over a defendant's choice of counsel, which is also unconscionable and repulsive to our system of justice.

CONCLUSION

The question presented in this case is one in which the Supreme Court of Virginia has decided in direct opposition to this court's decisions in *Massiah v. United States,* 377 U.S. 201 (1964), and *Brewer v. Williams,* 430 U.S. 387 (1977). The Commonwealth of Virginia violated petitioner's rights guaranteed to him by the Sixth Amendment and the Fourteenth Amendment to the Constitution of the United States. For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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By Counsel

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Counsel for Petitioner

APPENDIX A

Present: All the Justices

LINDBERG HUMMEL

OPINION BY JUSTICE ALEX. M. HARMAN, JR.

v. Record No. 771298

August 31, 1978

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ROCKINGHAM COUNTY
Hamilton Haas, Judge

Lindberg Hummel (Hummel or defendant) was convicted in 1975 of grand larceny by receiving stolen property. Upon appeal to this court, we reversed the conviction and remanded the case for a new trial. 217 Va. 548, 231 S.E.2d 216 (1977). Upon retrial, Hummel was again convicted by a jury of the offense charged and his punishment was fixed at five years in the penitentiary. We awarded defendant a writ of error to review his claim that the trial court erred in not suppressing certain evidence for alleged prosecutorial and police misconduct, and defendant's further claim that action taken by the prosecutor and police deprived him of his constitutional right to counsel.

In November, 1976, while Hummel's first appeal was pending, Anthony Thomas Terry (Terry), a convicted felon who was the key witness against Hummel at his first trial, advised Detective Lieutenant Hubert B. Meyers (Meyers or

detective) of the Harrisonburg Police Department that Terry had been approached by defendant's brother, Woodrow Hummel, and offered a bribe to change his testimony against defendant. The detective, after consultation with the Commonwealth's Attorney, arranged with Terry to monitor and record telephone calls between Terry and Woodrow Hummel. Two conversations between Terry and Woodrow Hummel on November 14, 1976, were recorded. On the same day, at Woodrow Hummel's suggestion, Terry called a telephone number given to him by Woodrow Hummel and spoke with the defendant. This telephone conversation and several calls the following day between Terry and the Hummels were also monitored and recorded by Meyers.

Our opinion reversing Hummel's first conviction was announced on January 14, 1977. On January 27, 1977, in response to a message left by Hummel with Terry's mother, Terry again called the defendant from a monitored telephone at the police station. In this conversation Hummel offered Terry a bribe to change his testimony. The following excerpt is illustrative of this conversation:

* * *

"Hummel:	In other words, you know damn well if you go back to Court all in the hell you have to do is say you don't remember.
"Terry:	Yeah.
"Hummel:	I mean that ain't no damn crime not to remember.
"Terry:	No.
"Hummel:	Anyway, I tell you what I'll do.
"Terry:	Yeah.
"Hummel:	In other words if you go in there [the attorneys' offices] just go in there and talk to [one of my attorneys].

"Terry:	Just talk to him?
"Hummel:	Yeah, I'll give you $50 whenever you talk to him then if they kick the thing out, I'll give you some more."

* * *

It should be noted that Hummel never made a direct admission of guilt in any of his conversations with Terry.

Pursuant to arrangements made on January 27, Terry was to go to a shoeshop operated by Jimmy Shaffer near the offices of Hummel's attorneys, and to the attorneys' offices on the morning of January 28. Before he kept these engagements, the police concealed a radio transmitter on Terry's person. By means of this device the police monitored and recorded conversations between Jimmy Shaffer and Terry, and between one of Hummel's attorneys and Terry. The conversations between Shaffer and Terry establish that Shaffer paid the $50 promised by Hummel to Terry after Terry had been interviewed by Hummel's attorney. A transcript of the meeting between Terry and one of Hummel's attorneys reveals only a routine interview of a prospective witness, and there is not even a suggestion of misconduct or impropriety on the part of the attorneys.

Prior to March 17, 1977, the date set for Hummel's retrial, the Commonwealth's Attorney revealed the existence of the recorded conversations to Hummel's attorneys and furnished them with a transcript of the recordings. Upon motion of Hummel's attorneys, with Hummel's agreement and consent, they were permitted to withdraw because they felt their continued representation might possibly result in prejudice to the defendant. Hummel promptly obtained other counsel, who continue to represent him, and his trial was postponed for ample time for the attorneys to prepare for trial.

At trial, a tape recording of the conversation of January 27, excerpted above, between Lindberg Hummel and Terry was admitted in evidence and played for the jury over objection of defense counsel. The jury, in fact, heard the tape recording twice, once during trial and once, at the jury's request, during deliberations. The major thrust of defendant's argument on appeal is the alleged error in the trial court's refusal to suppress the tape recording.

The defendant argues that *Massiah v. United States,* 377 U.S. 201 (1964), requires reversal of his conviction. Massiah, indicted on narcotics charges, had retained counsel at the time police secretly recorded a conversation between a cooperative co-defendant and Massiah in which Massiah made incriminating statements about his involvement with narcotics in the pending case. The United States Supreme Court, limiting its decision to Sixth Amendment grounds, held that:

> ". . . petitioner was denied the basic protections of that guarantee [Sixth Amendment right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206.

Hummel contends that he had been indicted, had retained an attorney, and was victimized by the state acting through a willing accomplice in precisely the same fashion as Massiah. Further, Hummel asserts that the exclusionary rule of *Massiah,* recently reaffirmed in *Brewer v. Williams,* 430 U.S. 387 (1977), is buttressed by this Court's decision in *Cooper v. Commonwealth,* 205 Va. 883, 140 S.E.2d 688 (1965), wherein we held certain statements made in the absence of counsel after indictment inadmissible.

In order to distinguish *Massiah* and related cases from the present controversy, the Commonwealth has two arguments. First, it is urged that the Harrisonburg Police were investigating an entirely new and different crime, bribery, rather than, as in *Massiah,* that with which the defendant already stood accused.

The Commonwealth's second argument is that it acted legally in following up Terry's complaint of attempted bribery by an investigation aimed at ferreting out new and further criminal activity. It is asserted that, as to the possible bribery charge, this was investigatory and not accusatory, leaving the Sixth Amendment right to counsel objection wanting. *Escobedo v. Illinois,* 378 U.S. 478 (1964). Thus, it is argued, while acting pursuant to its obligations to bring bribery to light, any information legally obtained would not be suppressible in any other trial.

While *Massiah* and its progeny stand for the proposition that the Sixth Amendment right to counsel proscribes surreptitious interrogation by a government agent of an accused about an offense with which the accused has already been charged, this exclusionary rule does not apply to information legally obtained in the investigation of a new and different criminal offense initiated by the accused while awaiting trial.

We note that Hummel initiated the conversation, later heard at trial, by requesting that Terry contact him. It is clear from the recording that Hummel sought to frustrate the prosecution of the grand larceny charge by tampering with the testimony of Terry, his principal adversary witness. There are few actions more indicative of guilt than those of a person professing innocence while attempting to secure a substantial change in testimony known to be damaging. In

this context, there is no strength to the argument that the tape recording could be used, if at all, only at a subsequent trial for bribery. The facts of this case mandate a rule different from *Massiah*, namely, *where the accused illegally attempts to subvert his prosecution by bribery, he has neither a right to notice of the investigation of the alleged bribery nor, under the Sixth Amendment, a right to presence of his attorney. See Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. Osser*, 483 F.2d 727 (3rd Cir. 1973).

To inform Hummel or his counsel that a bribery investigation was underway would thwart and frustrate the police and prosecution from gathering evidence at the only practical time they could gather that information. To adopt such a rule would place one already indicted or accused of a criminal offense in the favored position of knowing that the police could not investigate his further criminal activity without first giving him notice of their intention to make such an investigation.

The Constitution demands that an accused have the effective assistance of counsel. At a minimum, this fundamental right attaches at the time the accused is charged or at the time of custodial detention. *Escobedo v. Illinois, supra; Miranda v. Arizona*, 384 U.S. 436 (1966). While we protect and uphold this right, it does not extend to the investigatory stages of a crime, when the suspect has neither been charged nor detained for that offense. We hold that evidence legally obtained in such an investigation will not be suppressed merely because the defendant, at the time of such investigation, already stood accused of another separate offense.

We will now look at the defendant's claims that the police, by monitoring and recording the interview between Terry

and one of Hummel's attorneys, deprived him of his constitutional right to counsel. As we noted earlier, a transcript of that interview disclosed nothing more than a routine interview by counsel of a prospective witness. Counsel's decision to withdraw from Hummel's defense was made with Hummel's acquiescence and consent, because the attorneys were fearful that their continued representation might somehow result in prejudice to the defendant. Hummel promptly obtained other counsel, who have ably represented him since that time. The Constitution does not guarantee that the defendant will be represented by a particular attorney. It does guarantee that he will be adequately represented by a competent attorney. Since the record discloses that defendant's present counsel have provided that quality of representation, we find no merit in this claim of the defendant.

Finding no reversible error, we will affirm the judgment of the trial court.

Affirmed.

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 31st *day of* August, 1978.

Lindberg Hummel, Appellant,

against Record No. 771298

Commonwealth of Virginia, Appellee.

Upon an appeal from and supersedas to a judgment rendered by the Circuit Court of Rockingham County on the 11th day of May, 1977.

This day came again the parties, by counsel, and the court having considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the appellant pay to the Commonwealth thirty dollars damages, and also the costs expended about her defense herein.

Which is ordered to be forthwith certified to the said circuit court.

A Copy,

Teste:

/s/Allan L. Lucy
Clerk

Appellee's costs:

Attorney's fee	$50.00
Printing brief - Code, §14.1-182 - Not to exceed $200	

Teste:

/s/ Allan L. Lucy
Clerk

APPENDIX C

IN THE SUPREME COURT OF VIRGINIA

LINDBERG HUMMEL, Plaintiff in error,

against Record No. 771298

COMMONWEALTH OF VIRGINIA, Defendant in error.

PETITION FOR STAYING EXECUTION OF JUDGMENT

COMES NOW, LINDBERG HUMMEL, by counsel, and prays for the entry of an order staying execution of this Court's judgment rendered herein on August 31, 1978, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this Court.

LINDBERG HUMMEL
By Counsel

/s/William H. Ralston, Jr.
William H. Ralston, Jr.
MOORE, JACKSON, GRAVES & RALSTON
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and

/s/Robert Dinsmore, Jr.
Robert G. Dinsmore, Jr.
HATMAKER, DINSMORE & STABLES
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Harrisonburg, Virginia 22801
Counsel for Plaintiff in error

CERTIFICATE

We hereby certify that one copy of the foregoing Petition for Staying Execution of Judgment has been mailed to Honorable Burnett Miller, III, Office of the Attorney General, 900 Fidelity Building, 830 East Main Street, Richmond, Virginia 23219, Counsel for the Defendant in error, and to David I. Walsh, Esquire, Commonwealth's Attorney, Court House, Harrisonburg, Virginia 22801, this 14th day of November, 1978.

/s/William H. Ralston, Jr.
Counsel for Lindberg Hummel

/s/Robert G. Dinsmore, Jr.
Counsel for Lindberg Hummel

APPENDIX D

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 1st *day of* February, 1978.

Lindberg Hummel, Appellant,

against Record No. 771298

Commonwealth of Virginia, Appellee.

From the Circuit Court of Rockingham County

Upon the petition of Lindberg Hummel on appeal and supersedeas is awarded him from a judgment rendered by the Circuit Court of Rockingham County on the 11th day of May, 1977, in a prosecution by the Commonwealth against the said petitioner for a felony; upon the petitioner, or some one for him, entering into cost bond with sufficient surety before the clerk of the said circuit court in the penalty of $500, with condition as the law directs; but said supersedeas, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,
Teste:

/s/Allan L. Lucy
Clerk

APPENDIX E

COMMONWEALTH
V.
LINDBERG HUMMEL

CHARGE TO JURY

If you find the accused, Lindberg Hummel, guilty of grand larceny by receiving or aiding in concealing stolen property of a value of One Hundred Dollars or more, knowing the same to have been stolen, as charged in the indictment, then you will say so and fix his punishment at confinement in the penitentiary for a period of not less than one nor more than twenty years, or in the discretion of the jury by confinement in jail not exceeding twelve months or by a fine not exceeding One Thousand Dollars, either or both.

If you find him not guilty of grand larceny as aforesaid, but find him guilty of petit larceny by receiving or aiding in concealing stolen property of a value of less than One Hundred Dollars, then you will say so and fix his punishment by confinement in jail not exceeding twelve months or by a fine not exceeding One Thousand Dollars, either or both.

If you find him not guilty you will say so and no more.

We the Jury find the accused Guilty as Charged of Grand larceny and fix his punishment at confinement in the penitentiary for a period of 5 years.

Jury Forman
Gary W. Lee

In The

Supreme Court of the United States

October Term, 1978

No. 78-868

LINDBERG HUMMEL,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

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Supreme Court Building
Richmond, Virginia 23219

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v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Virginia on August 31, 1978, in *Hummel* v. *Commonwealth of Virginia* has not yet been reported and appears in petitioner's Appendix 1a.

JURISDICTION

The petitioner seeks this Court to review the judgment of the Supreme Court of Virginia on August 31, 1978, pursuant to jurisdiction of 28 U.S.C. § 1257.

QUESTIONS PRESENTED

(1) Whether, in view of *Massiah* v. *United States,* 377 U.S. 201 (1964) and *Brewer* v. *Williams,* 430 U.S. 387 (1977), the trial court erred in refusing to suppress certain taped conversations which took place between the petitioner and the key prosecution witness, said conversations having been recorded with the knowledge and direction of the Commonwealth of Virginia and occurring while petitioner was represented by counsel, in violation of his rights guaranteed by the Sixth Amendment to the Constitution of the United States of America, and made applicable to the States by the Fourteenth Amendment to the Constitution of the United States of America.

(2) Whether the actions of the Commonwealth denied the petitioner of his Sixth Amendment right to effective assistance of counsel.

CONSTITUTIONAL PROVISIONS INVOLVED

(1) Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

(2) Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any state deprive any person of life, liberty or property, without due process of law. . . ."

PRELIMINARY STATEMENT

Support for factual statements made herein will be by reference to the joint appendix filed in the Supreme Court of Virginia and designated (App. .....) or as to specific facts found by the Supreme Court of Virginia in its opinion.

STATEMENT OF THE CASE

Petitioner, Lindberg Hummel, was previously convicted on June 24, 1975, in the Rockingham County Circuit Court of grand larceny by receiving stolen property and was sentenced to serve a term of ten (10) years in the penitentiary. *Hummel* v. *Commonwealth,* 217 Va. 548, 231 S.E.2d 216 (1977). He was released on bond pending his appeal to the Supreme Court of Virginia, and on January 14, 1977, the Supreme Court granted his appeal and remanded the case for a new trial. On April 28, 1977, the petitioner was again found guilty by a jury of grand larceny by receiving stolen goods and sentenced to five (5) years confinement in the Virginia State Penitentiary.

During the pendency of the petitioner's appeal, which resulted in the new trial and subsequent reconviction, and on or about November 14, 1976, the Commonwealth's chief witness, Anthony Thomas Terry, was contacted by petitioner's brother, Woodrow Hummel. and a meeting and conversation took place at a bar and grill in Harrisonburg, Virginia. Following that meeting, Terry arranged through his attorney to contact the Harrisonburg police, filed a complaint, and volunteered to tape further conversations with the Hummels. (App. 023-037, 224-225)

Conversations between the petitioner and Terry took place on November 14, 1976, January 27, 1977, January 28, 1977, and February 2, 1977. All conversations were made from the Harrisonburg Police Department and are transcribed as Exhibits 1 through 4 in the record of the Supreme Court of Virginia. All of these conversations were taped and authorized by the Commonwealth's Attorney based upon probable cause and for the purpose of investigating the possibility of the commission of another crime, to-wit: bribery.

The November conversation clearly sought to feel out Terry by petitioner and by Woodrow Hummel on behalf of petitioner to see whether he would accept money to give a favorable statement to petitioner's attorney that might help on the appeal. After the petitioner was apparently told by his attorneys that a statement would not help, further efforts to convince Terry to give such a statement dwindled.

After the announcement on January 14, 1977, that the petitioner's appeal was granted and a new trial ordered, the petitioner made further inquiries for Terry to contact him, and personally called Terry on January 27, 1977. (App. 206) This conversation was also recorded and petitioner clearly suggested that Terry go in to talk to his lawyers and tell them anything that would make it sound a little better for petitioner, and to tell the police that he did not remember circumstances surrounding the offense. As an alternative, petitioner suggested that maybe Terry should leave town and not be available at the trial. The following excerpt was found to be illustrative of this conversation by the Supreme Court of Virginia, and appears in its opinion:

* * *

"Hummel: In other words, you know damn well if you go back to Court all in the hell you have to do is say you don't remember.

"Terry: Yeah.

"Hummel: I mean that ain't no damn crime not to remember.

"Terry: No.

"Hummel: Anyway, I tell you what I'll do.

"Terry: Yeah.

"Hummel: In other words if you go in there [the attorney's offices] just go in there and talk to [one of my attorneys].

"Terry: Just talk to him?

"Hummel: Yeah, I'll give you $50 whenever you talk to him then if they kick the thing out, I'll give you some more."

* * *

The petitioner suggested to Terry that he tell his attorneys that a man named Bill Shiflett, who was then dead had bought the stolen goods and not petitioner, and that Terry had gotten the money for the stolen articles from under an ashtray and not from petitioner. This was the story that petitioner had apparently told his attorneys. (App. 156-161, 228-242) Although petitioner never made a direct admission of guilt in any of the conversations with Terry, he clearly intended to bribe Terry in an effort to change the outcome of his upcoming new trial. During all of these conversations, petitioner had been previously indicted and had retained counsel on the pending grand larceny charges. Neither he nor his counsel were informed that the conversations with Terry were being taped.

Subsequent to the January 27, conversation the witness, Terry, went to the office of petitioner's attorneys at petitioner's request, and was interviewed concerning the incident. This conversation was also taped, but was not introduced into evidence at the subsequent trial. In fact, the January 27, conversation between petitioner and Terry was the *only* tape recording introduced at petitioner's retrial on April 28, 1977.

The new trial for petitioner had been scheduled to begin on March 17, 1977, but on March 14, 1977, the Commonwealth's Attorney informed petitioner's counsel of the existence of the taped conversations and of his intention to introduce some of them in his case-in-chief. On March 16, 1977, petitioner's counsel moved to withdraw from the

case, their motion was sustained, and present counsel entered the case on March 17, 1977.

Counsel cited for their reasons for withdrawing that the jury might draw an inference of improper conduct on their part, and that it would be unfair for them to represent the petitioner while they were attempting to justify their actions. Later, counsel testified that their primary reason was that they assumed that they would be called as witnesses, and that would have been unethical.

The Commonwealth's Attorney testified at a hearing on the motion to disqualify him as Commonwealth's Attorney that his reasons for taping the conversation with the attorneys was that although he did not suspect the attorneys' involvement in the incident, he was furthering his investigation that another crime was taking place, and that he wanted to continue his surveillance of the witness, Terry. (App. 011) In addition, the Commonwealth's Attorney maintained throughout that the implication from the tapes was clearly that there was no inference of misconduct on behalf of counsel, and that he would clearly so state to the jury if necessary. (App. 008-015, 292) It is true that counsel were later called as witnesses, but for the defense and not the prosecution. The Court thereafter asked petitioner whether he wanted his counsel to withdraw, and he testified that if they felt that way about it, he did. The Court allowed counsel to withdraw based upon petitioner's request, and allowed petitioner time to obtain additional counsel who are representing him now. (App. 018)

The defense moved prior to trial and again at trial to suppress all of the tape recordings. The Commonwealth's Attorney asked to introduce only non-prejudicial portions of the recording of January 27, 1977, between petitioner and Terry. The defense countered that the conversation

should not be taken out of context, and that the entire conversation should be admitted, and the defense should be granted leave to introduce the other conversations "depending upon the outcome of the trial" in order to explain the transcript of January 27. (App. 110-122) The defense, thereafter, argued orally to the jury concerning the prior tapes, the context in which they should be considered, and the fact that the defendant had been the subject of a prior conviction which had been overturned on appeal. (App. 169-172, 243-247)

At trial, the tape recording of the conversation of January 27, partially excerpted above, between petitioner and Terry, was admitted in evidence and played for the jury over the objection of defense counsel. The jury, in fact, heard the tape recording twice, once during trial and once at the jury's request, during deliberations.

ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

I.

The Decision Of The Supreme Court Of Virginia In Sustaining The Petitioner's Criminal Conviction Was Not Contrary To The Sixth Amendment Principles Enunciated By This Court In Massiah v. United States, And Brewer v. Williams. Evidence Should Not Be Excluded Because Of The Conduct Of Police On Sixth Amendment Principles Prior To The Time In Which An Accused Is Entitled To Counsel.

Petitioner has maintained throughout the criminal proceedings in Virginia culminating in the petition, and it is admitted by respondent that, at the time the tape recordings were made between the petitioner and Terry that petitioner had been previously indicted, tried, was awaiting retrial on

the charges of grand larceny by receiving stolen goods, and counsel had been retained and was representing him on the grand larceny charges. It is also not questioned that Terry was the chief witness for the prosecution, had agreed with the police to record conversations with petitioner, and that neither petitioner nor his counsel were informed of the recordings.

Based upon these facts, petitioner's position is and has been that the tape recordings should not have been played for the jury and admitted into evidence in light of the holding and exclusionary rule of *Massiah* v. *United States,* 377 U.S. 201 (1964), and *Brewer* v. *Williams,* 430 U.S. 387 (1977) (extending the exclusionary rule of *Massiah* based upon the Sixth Amendment to a state prosecution under the Fourteenth Amendment). Respondent believes that these cases stand for the legal proposition that evidence of guilt obtained as a result of police interrogation, whether direct or surreptitious, in the absence of counsel after indictment is a violation of the Sixth and Fourteenth Amendments to the Constitution of the United States, and the evidence must be excluded.

The respondent submits that this case is distinguishable from the *Massiah* doctrine and resulting exclusionary rule for two reasons and, consequently, the tape recorded evidence was properly considered. First, the respondent will argue that where an accused has embarked upon criminal activity which is unrelated to the charges for which he stands indicted and represented by counsel, the police are not required by the Sixth Amendment to inform him of their investigatory practices including surreptitious use of an informant to gain information. Secondly, respondent maintains that the exclusionary rule of *Massiah* should not apply to restrict evidence relevant to the charges upon

which an accused has been indicted and counsel retained if that evidence was obtained lawfully upon investigations of unrelated criminal charges.

Massiah, Brewer v. *Williams, supra,* and *McLeod* v. *Ohio,* 381 U.S. 356 (1964) (facts recorded at 203 N.E.2d 349) (a case relied upon by Petitioner below) are all cases in which police officers have, either by direct or surreptitious means, conducted *interrogations* of an accused in the absence of counsel after the right to counsel had attached.

In *Massiah* and *Brewer,* the accused had been indicted and counsel appointed. In *Massiah,* the government sought to record the testimony of the accused and the government informant by a listening device attached to an automobile with the cooperation of the informant. In *Brewer,* detectives sought to gain information from the accused directly by questioning him in the absence of his two appointed attorneys and contrary to their agreement that they would not do so. In *McLeod,* police officers sought to question the accused after his indictment, but prior to the appointment of an attorney. In all of these cases, the *interrogation* was for the purpose of gaining information relative to the crime for which the accused had been indicted, or similar crimes of a like nature.

Respondent believes first that *Massiah's* Sixth Amendment proscription must be read in light of an accused's Fifth Amendment right to be informed of his right to have counsel present at a critical stage of the proceeding. There must be at first instance official *interrogation,* whether it be inside the police station or while the defendant is out on bail. *Messiah, supra; Miranda* v. *Arizona,* 384 U.S. 451 (1961). Interrogation is described in *Massiah* as "testimony elicited by police" and in *Miranda* as "questioning initiated by law enforcement officers after a person has been taken

into custody." Without resorting to the tests of "custody," it is apparent that the *questioning* or *encounter must initiate with* the *police*.

In our case, it is evident from the tape recordings and the Supreme Court of Virginia found, as a matter of fact, that petitioner through his brother and other intermediaries initiated the conversations with Terry, by requesting that Terry contact him. The Supreme Court of Virginia also found, and the evidence amply supports the finding that petitioner sought to frustrate the prosecution of the grand larceny charge by tampering with the testimony of Terry, his principal adverse witness. It was not until this initial contact was made that Terry contacted the police in the nature of a complaint and agreed to be recorded. Consequently, the statements made were not the result of police interrogation or a covert substitute for such, they were free statements to a known state's witness in an effort to see what his attitude was relative to being susceptible to a bribe,[1] an offense for which the petitioner had not been indicted.

In *Massiah, McLeod,* and *Brewer,* the evidence sought to be introduced by the interrogation was voluntary in a constitutional sense, but was information elicited by police after the accused had been indicted upon charges similar to those about which the information was sought, and without the aid of counsel. Here, the cards were on the table and the petitioner knew very well that Terry was the prosecution's witness. There was no initial prompting by Terry or police officials to gain incriminating evidence, and the volition to bribe a known state's witness was clearly that of the

[1] Section 18.2-436, Code of Virginia (1950), as amended: "If any person procures or endures another to commit perjury or to give false testimony under oath in violation of any provision of this article, he shall be punished as proscribed in Section 18.2-434 (Class 5 Felony)...."

petitioner alone, and consequently, it is submitted not an *interrogation* within the meaning of *Massiah* or *Miranda*.

Assuming that the relationship between Terry and petitioner could arguably have developed into an interrogation within the meaning of the Fifth Amendment prior to the January 27 conversation, the respondent believes that it is clear that the Sixth Amendment right advanced by *Massiah* had not attached to the petitioner at the time he made his statements to Terry when *Massiah* is read in light of this Court's prior guidance as to when the Sixth Amendment right attaches to an accused in a criminal investigation.

In *United States* v. *Wade,* 388 U.S. 218 (1967), and *Kirby* v. *Illinois,* 406 U.S. 682 (1972), the Court in considering when an accused has a right to counsel found that the determinations must be made in terms of the weight of the competing interests the right effects. In setting forth the counterveiling policy considerations which govern whether a Sixth Amendment right attaches, this Court spoke in terms of balancing the right of a suspect to be protected from judicial procedures on the one hand, and the interest of society in the prompt, purposeful investigation of an unsolved crime on the other. It has been said that the balance wheel between these competing interests is the constitutional gloss of the Sixth Amendment. *See People* v. *Santos,* 381 N.Y.S.2d 205 (1976).

In *Wade,* the balance was struck in favor of the accused *after* indictment at a line-up procedure, and in *Kirby,* the balance was struck in favor of society *prior* to indictment. It is fair to say that once the state has gained sufficient information to indict, or begin its charging process, it should be required to bring into play its criminal procedures and at the same time afford the accused his constitutional safeguards relative to those procedures. Prior to the state having

gained sufficient information to charge the accused, however, no Sixth Amendment right attaches and society's interests in bringing criminals to justice is paramount. *People* v. *Santos, supra.*

There is no question that the petitioner in this case had been indicted on the larceny by stolen property charges at the time that his conversation with Terry took place and counsel was representing him on those charges. The distinction that the respondent makes between this case and *Massiah,* which was found to be compelling by the Supreme Court of Virginia is that petitioner here was not being investigated on the same charges or within the same sphere of investigation which had prompted the Commonwealth to institute its criminal procedure against him in the first instance.

Here, petitioner on his own volition cut a separate course to commit a totally separate crime from that which had been investigated by the Commonwealth, and at the same time sought to subvert the criminal process of the state on his original charge. The Supreme Court of Virginia found under these facts a different rule from *Massiah* was mandated, and held that:

> "where the accused illegally attempts to subvert his prosecution by bribery, he has neither a right to notice of the investigation of the alleged bribery nor, under the Sixth Amendment, a right to the presence of his attorney. *See Hoffa* v. *United States,* 385 U.S. 293 (1976); *United States* v. *Osser,* 483 F.2d 727 (3rd Cir. 1973)." *Hummel* v. *Commonwealth,* Appendix 6a.

The respondent submits that such a result is in accord with this Court's balancing concept to determine when the Sixth Amendment right attaches. As stated by the Virginia Supreme Court at Appendix 6a:

> "to inform Hummel or his counsel that a bribery investigation was underway would thwart and frustrate the police and prosecution from gathering evidence at the only practical time they could gather that information. To adopt such a rule would place one already indicted or accused of a criminal offense in the favored position of knowing that the police could not investigate his further criminal activity without first giving him notice of their intention to make such an investigation."

The respondent submits to the Court that the philosophical reasoning of the Supreme Court of Virginia is basically the same as that of this Honorable Court in its application of the balancing test to determine when the Sixth Amendment right attaches in cases such as *Kirby* and *Wade.*

It is true, as counsel points out, that the United States made a seemingly similar argument in *Massiah* that the evidence should have been admissible because they were continuing their investigation of *Massiah.* The respondent believes that the basic distinction between the result reached in this case and *Massiah* is that the government's continuing investigation of *Massiah* was on related charges and about offenses which had already been committed by *Massiah* and his cohorts. They had already gained sufficient information to indict, and had elected to do so. In our case, the investigation of petitioner centered around a new criminal charge which had been committed by him *after* he had been indicted, and was not evidentiarily related to the charges which had been initiated by the Commonwealth.

The respondent believes further that the distinction argued in this case gains further validity when viewed in light of the purposes of an evidentiary exclusionary rule of which *Massiah* is an example. There is no question that even under

Massiah evidence of a separate crime obtained in furtherance of the investigation of the same charge for which he had been indicted could have been introduced in a trial for bribery itself. *See Hoffa* v. *United States,* 385 U.S. 293 (1976); *United States* v. *Merritts,* 527 F.2d 713 (7th Cir. 1975); *United States* v. *Missler,* 414 F.2d 1293 (4th Cir. 1969); *United States* v. *Osser,* 483 F.2d 727 (3rd Cir. 1973); *cert. denied,* 414 U.S. 1028 (1973). However, as the Court pointed out in *Massiah,* the same evidence could not have been presented on the charge for which accused had already been indicted if counsel had been appointed on that charge and not notified.

The respondent argues, however, that as found by the Supreme Court of Virginia in this case that the Sixth Amendment right had not attached to the accused during the investigative stage of the bribery charge, and consequently, the purpose for an exclusionary rule was not present. In *Stone* v. *Powell,* 428 U.S. 465 (1976), and *United States* v. *Calandra,* 414 U.S. 338 (1974), the Court discussed in detail the purposes of an evidentiary exclusionary rule in light of its protection of the Fourth Amendment right to be free of an illegal search and seizure. Mr. Justice Powell speaking for six members of the Court in *Stone* v. *Powell,* at page 486, stated the reasons for such a rule:

> "Primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights."

The Court explained further in *Stone* that concern with preserving the integrity of the judicial process also has limited force as to the justification for an exclusionary rule, but the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. *Stone,* page 485 through 487. *See also United States* v. *Calandra, supra; Walder* v. *United States,* 347 U.S. 62 (1954).

Also, in *Stone,* Mr. Justice Powell explained that whether an exclusionary rule should apply in a given instance was based upon a balancing test of competing interests. *Stone,* page 488. The Court using *Walder* v. *United States, supra,* as an example, explained that illegally seized evidence could be used by the government to impeach the defendant where it could not be otherwise admitted because the need to prevent perjury and to insure the integrity of the trial process outweighed the need for deterrence.

Respondent submits that the facts of our case all balance against the application of an exclusionary rule. This is not a case where police have acted improperly. Here, the Commonwealth of Virginia was investigating a totally separate crime committed by the petitioner which was in itself an effort to subvert the integrity of the criminal process of the charges upon which he had been indicted. The information acquired although relevant to the charges for which he was indicted was derived at by totally independent and legal investigatory procedures. *See Wong Sun* v. *United States,* 371 U.S. 471, 486, 488 (1963).

Society's interests in prompt law enforcement and maintaining the integrity of its judicial process must certainly outweigh any Sixth Amendment interest that petitioner, who was attempting to undermine the process, can assert. This is especially true where the conduct in question is an independent crime in its investigatory stages. In accord with the reasoning of the Supreme Court of Virginia, the respondent urges that to extend the Sixth Amendment right under these circumstances would allow the multiple offender a free hand to continue his illegal activities and snicker at

our system of justice. The respondent does not believe that this Court has so interpreted the Sixth Amendment.

II.

The Actions Of The Commonwealth Of Virginia In Recording A Conversation Between The Petitioner's Attorney And A Known Government Witness Did Not Deprive Petitioner Of Effective Assistance Of Counsel As Guaranteed By The Sixth And Fourteenth Amendments To The Constitution Of The United States.

The petitioner argues here by reference to *Massiah,* and the Sixth Amendment to the Constitution essentially the same argument he made to the Supreme Court of Virginia based upon Article I, Section 8 of the Constitution of Virginia, that the actions of the Commonwealth in taping the conversation between Terry and petitioner's attorney deprived him of effective assistance of counsel.

Respondent believes that these arguments are clearly governed by the principles announced by this Court in *Weatherford* v. *Bursey,* 429 U.S. 545 (1977), *Hoffa* v. *United States, supra,* and the reasoning of the Supreme Court of Virginia on these issues. In *Weatherford,* the facts are strikingly similar to this case. An undercover agent participated in a pre-trial conference between an accused and his attorney at the request of the accused. In that case, unlike our case, the attorney was not even aware that the agent was a potential government witness and, in fact, the agent denied that he would testify for the government. Also, in *Weatherford,* conversations were overheard by the agent between the attorney and the defendant himself. The Court held that the Sixth Amendment was not violated, where no communications between attorney and client were devulged by the agent, and where he went to the conference, not to spy, but at the request of the defense.

In *Hoffa,* an informant sat in on conversations that Hoffa had with his attorneys and others during the course of Hoffa's trial on the charge of violating the Taft-Hartley Act. The trial resulted in a hung jury. Hoffa was then tried for tampering with the jury. The informant testified at the latter trial with respect to conversations he had overheard in Hoffa's hotel suite during the prior trial, not including however, the conversations Hoffa had with counsel. The Court held that the Sixth Amendment did not subsume a right to be free from intrusion by informers into the counsel-client consultations, and since the evidence introduced on the bribery charge did not include evidence of an attorney-client privilege, the Sixth Amendment was not violated.

Of similar relevance to this particular issue, it has been held by this Court that a defendant has no justifiable or constitutional protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police. Even expectations of loyalty are not protective when it comes out that a colleague is a government agent. *See Hoffa* v. *United States, supra,* page 302; *United States* v. *White,* 401 U.S. 745, 749-753, (1970); *Wilkes* v. *Commonwealth,* 217 Va. 885, 234 S.E.2d 250 (1977). Since Terry was known to be a Commonwealth's witness, the decision in these cases would seem to have all the more efficacy.

In fact, Terry was interviewed by counsel with a third party present meaning his testimony would be subject to impeachment no matter what he said if inconsistent at trial. It is evident from the taped conversations between the Petitioner's attorney and the witness that the attorney dealt with the witness at arm's length, he was never contemplated to be a defense witness, and the purpose for the interview was to find out what he was going to say rather than to prepare him for trial.

The Supreme Court of Virginia found on these issues that the transcript of the interview disclosed nothing more than a routine interview by counsel of a prospective witness. Counsel's decision to withdraw from petitioner's defense was made with his acquiescence and consent, because the attorneys were fearful that their continued representation might somehow result in prejudice to the defendant. Petitioner promptly obtained other counsel, who have ably represented him since that time. *Hummel* v. *Commonwealth,* Appendix 7a.

The Petitioner did not assign as error in the Court below that he was entitled to counsel of his particular choice in the Sixth Amendment sense, nevertheless, it is evident from a reading of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and *Powell* v. *Alabama,* 287 U.S. 45 (1932), in light of *Stonebraker* v. *Smith,* 187 Va. 250, 46 S.E.2d 406 (1948), that the Constitutions of Virginia and the United States do not require that a defendant is entitled to specific counsel of his choosing. Those cases only require that the Sixth Amendment guarantees him a *reasonable opportunity to secure counsel* of his own choosing. That opportunity was presented him in this case. The Supreme Court of Virginia found that representation by those attorneys was competent, and petitioner has presented no evidence to show otherwise.

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Burnett Miller, III, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 1st day of February, 1979, I mailed with first class postage prepaid, a true copy of this Respondent's Brief In Opposition To Grant Of Certiorari to William H. Ralston, Jr., Esquire, Moore, Jackson, Graves & Ralston, 312 Virginia National Bank Building, Harrisonburg, Virginia 22801, and to Robert G. Dinsmore, Jr., Esquire, Hatmaker, Dinsmore & Stables, 206 Virginia National Bank Building, Harrisonburg, Virginia 22801, Counsel for Petitioner herein.

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BURNETT MILLER, III
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